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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Appellant, v. CHRISTOPHER LEE, Defendant and Respondent.	H042909 (Santa Clara County Super. Ct. No. CC779769)

In 2010, a jury convicted petitioner and defendant Christopher Lee, along with codefendant Kosal Khek, of first degree murder. (Pen. Code, § 187, count 1.)[1] Lee was not present at the scene of the killing, so the jury was instructed that he could be guilty of first degree murder under one of two derivative liability theories, either as a direct aider and abettor, or under the natural and probable consequences theory of liability. Lee, who was a juvenile at the time he committed the offenses, was sentenced to a total term of 32 years to life in prison, including a sentence of 25 years to life on the charge of first degree murder.[2]

[1] Unspecified statutory references are to the Penal Code.

[2] Before trial, Lee pleaded guilty to two felony charges arising from a separate incident involving a different victim. The additional charges were assault with a firearm (§ 245, subd. (a)(2), count 2) and discharging a firearm from a vehicle and inflicting great bodily injury (former § 12034, subd. (c), count 3). He was sentenced to the upper term of seven years on count 3, consecutive to his term of 25 years to life, and the middle term of three years, stayed under section 654, on count 2.

Lee and Khek appealed, but this court affirmed their convictions in a nonpublished opinion. (*People v. Khek et al*. (Apr. 25, 2013, H036185 [nonpub. opn.]).) The California Supreme Court denied review.

On November 4, 2014, Lee filed a petition for writ of habeas corpus in the superior court seeking relief from his conviction for first degree murder based on *People v. Chiu* (2014) 59 Cal.4th 155 (*Chiu*), in which the California Supreme Court held holding that the natural and probable consequences theory cannot support a conviction for premeditated first degree murder. After requesting informal briefing and issuing an order to show cause, the superior court granted the petition on August 4, 2015, reversing Lee's conviction for first degree murder and offering the People the option of retrying Lee for that offense or accepting reduction of the conviction to second degree murder.

The District Attorney timely appealed.

For the reasons expressed herein, we find no error and will affirm the order granting the petition for writ of habeas corpus.

I. FACTUAL BACKGROUND[3]

A. Facts set forth in People v. Khek et al.

"Viet Society (VS) and Strictly Family (SF) are rival criminal street gangs in San Jose. Defendants [Lee and Khek] are VS members.

"On August 29, 2007, SF gang members drove to and stopped at the Magic Sands Mobile Home Park where several of defendants' friends were sitting on the grass near a swimming pool. One of the friends, Tuan Nguyen, began arguing with a passenger in the SF car, and the passenger pulled out a gun and shot Nguyen three times. Another of the

[3] We derive certain background facts from our nonpublished opinion in the direct appeal. (*People v. Khek et al*. (Apr. 25, 2013, H036185 [nonpub. opn.]).) Given the nature of our review from an order granting Lee's petition for writ of habeas corpus, we will grant the parties' request that we take judicial notice of the record in the direct appeal and will set forth additional facts from the underlying trial, including counsel's arguments to the jury following the close of evidence as well as the relevant jury instructions.

friends recognized the shooter and identified him to the police. Another friend described the car and a partial license plate number to the police. The police arrested the shooter and owner of the car for attempted murder.

"When defendants found out about the shooting, they began to plot revenge against SF via computer instant messaging. For example, Lee told Khek that he was going to find out where the shooter lived and added: 'Oh yeah. I found out that this Anthony [Nguyen] kid from Andrew Hill [High School] lives with Johnny. . . . [¶] . . . [¶] . . . We start by taking them out one by one. [¶] . . . [¶] . . . Just hit them up. Let's kill this Anthony kid from A Hill. He's a kid, too, just like Tuan. Eye for an eye.' And Khek told Lee: 'How does that Anthony kid look like? I am going to fuck his ass up. [¶] . . . [¶] And run away like an assassin. [¶] . . . [¶] And he won't know who hit him.' Lee later sent pictures of Anthony Nguyen to Khek, and Khek told Lee that 'I'm going to get him after school so maybe at 3:00.'

"On September 6, 2007, Anthony Nguyen, Phong Nguyen, Kim Huynk [*sic*], Lily Phong, and Kevin Huynh were smoking and talking outside a laundromat and the Q-Cup café. Khek walked up to Anthony Nguyen and asked whether he was Anthony. When Anthony Nguyen affirmed that he was Anthony, Khek stabbed him twice and ran away. Anthony Nguyen died at the scene from massive bleeding. One of the stab wounds penetrated his shoulder; the other wound penetrated his stomach four and a half inches, cut through the liver and aorta, and caused six to 12 inches of bowel to protrude from the body. Phong Nguyen and Kim Huynk [*sic*] identified Khek to the police. Police obtained an arrest warrant for Khek, determined that he was on probation with a search condition, arrested him at his apartment, and seized his computer. A witness linked Anthony Nguyen to Lee, and the police determined that Lee was on juvenile probation with a search condition. The police went to Lee's residence, conducted a probation search, and seized Lee's computer."

B. Additional relevant evidence, jury instructions and final arguments by counsel

On August 30, 2007, Khek wrote to Lee that Anthony was "gonna be on my hitlist" and Lee responded, "when . . . I'm off house arrest I'm going to fuck that nigga up." Khek then said he wanted to "beat [Anthony's] ass . . . bash his head on the fuckin cement."

During a further discussion on August 30, Lee wrote, "but I don't want to just beat this little Anthony kid up. I want to cap peel on this fool," to which Khek replied, "unleash King Kong on his ass . . . if he tweaks, foo, I could break his bones hella easy . . . . I should like grab his arm . . . and bend it. . . ." Lee replied that Khek should do it and "fuck his ass up like permanent shit." Lee went on, suggesting that Khek "do the stone cold stunner" and "the people's elbow" on Anthony. Khek said he would learn those moves on the "wwf.com" Web site and "break both arms. Give him a face plant." Khek wrote that he "can't just beat his ass when I see him . . . . [a]nd try to run."

On September 5, 2007, Lee messaged Khek and told him that Anthony was saying Khek "snitched." Lee suggested that he and Khek "should team up." Khek replied that he and another gang member would "dress like tennis players . . . [a]nd have a badminton racket case . . . with shit inside and post at Q-Cup." Lee said that Nguyen had told him that Khek and other gang members "didn't do shit" when they got "called . . . out" at the Magic Sands before Tuan was shot. Khek angrily responded, "I wasn't even there . . . I'm going to beat his fucking ass. . . . I'm going to bust his knee caps."

On September 6, Lee told Khek that Anthony "went to school today," but Sun [a fellow gang member] would not get out of his community schooling program until 3:30 p.m. Lee sent Khek some pictures of Anthony and said he was "the tall one." Khek replied, "That's sad. This foo is going to be retard soon." [*Sic*.]

Lee asked Khek what time he was going to community service, and Khek said, "I'm going to get him after school so maybe at 3:00." At 12:15 p.m., Khek messaged someone with the screen name Tvboiz408 and asked "[Y]ou want to go fuck somebody

up?" At 12:51 p.m., Khek messaged another screen name, OUTLAWlivin408, "do you want to go kill a kid with me?" Neither of those screen names was associated with Lee.

The trial court instructed the jury on both aiding and abetting (CALCRIM Nos. 400, 401) and natural and probable consequences liability (CALCRIM No. 403). Pursuant to CALCRIM No. 403, Lee could be found guilty of first degree murder if, "under all of the circumstances, a reasonable person in the defendant's position would have known that the commission of the first degree murder was a natural and probable consequence of the commission of the assault with force likely to produce great bodily injury." The trial court gave the jury a similar instruction for second degree murder. Accordingly, the jury was instructed that Lee could be guilty of first *or* second degree murder either by directly aiding and abetting or under the natural and probable consequences theory of liability.

In final argument, the prosecutor first explained the natural and probable consequences theory for the jury before arguing: "I don't think for a second that this evidence is about . . . Lee planning some lesser crime than murder, and I'm going to run through that. He wanted a murder from the get go. From the get go on August 29 he told Khek let's kill that Anthony kid. Okay. The only place this kicks in is if somehow you unanimously believe he never intended to kill him, Chris Lee never intended to kill him, he just intended to have him stabbed or hurt. Then this instruction kicks in because he's still guilty of murder if it's foreseeable that in the process of stabbing somebody they die, it's a natural and probable consequence of committing that kind of deadly assault on somebody that they could die, and you don't think he intended a murder to occur he's still guilty of murder if it was a natural and probable consequence of a planned crime just to hurt him. I don't think this instruction is going to come into play, but I'm just kind of dealing with the big picture here."

In his closing argument, defense counsel asked the jury to acquit Lee of murder, arguing he lacked knowledge of the murder plan and lacked the intent to kill. Defense

counsel also discussed the natural and probable consequences doctrine, noting that the prosecution "has pretty much communicated that they're not pursuing [as] they believe that . . . Lee all along intended to aid and abet a murder." Defense counsel continued by saying "if [Lee] indicates that really—my thought was I want to beat the guy up. Yeah, I said I wanted to hurt him and kill him and do serious physical harm to him that might result in his death but I wasn't expecting him to die. Then you do have this situation of assault with intent to inflict injury that result[s] in the commission of another crime, in this case murder. I believe I'm going to . . . assault with intent to do bodily harm and it ends up in a homicide. That's when that [natural and probable consequences] theory could apply, and it might in this case."

The jury asked one substantive question during deliberations.[4] This question referenced the natural and probable consequences instruction, CALCRIM No. 403, and asked for "clarification on the following—'1. The defendant is guilty of assault with force likely to produce great bodily injury in violation of Penal Code section 245(a)(1).' Does this mean the defendant Kosal Khek or the 'perpetrator,' or does it literally reference defendant [Lee]?" The trial court, after consulting with counsel, responded that the instruction was referring to Lee. The jury's verdict form, finding Lee guilty of first degree murder, did not specify which theory of first degree murder the jury had adopted in making that finding.

II. DISCUSSION

The People argue that the trial court erred in granting Lee's petition for writ of habeas corpus because any *Chiu* error below was harmless. We disagree.

A. Aider and abettor liability and Chiu

"Generally, a defendant may be convicted of a crime either as a perpetrator or as an aider and abettor. (Pen. Code, § 31.) An aider and abettor can be held liable for

[4] In addition to this substantive question, the jury sent out a note requesting more paper.

crimes that were intentionally aided and abetted (target offenses); an aider and abettor can also be held liable for any crimes that were not intended, but were reasonably foreseeable (nontarget offenses). [Citation.] Liability for intentional, target offenses is known as 'direct' aider and abettor liability; liability for unintentional, nontarget offenses is known as the ' " 'natural and probable consequences' doctrine." ' " (*In re Loza* (2018) 27 Cal.App.5th 797, 801, fn. omitted.) "Liability under the natural and probable consequences doctrine 'is measured by whether a reasonable person in the defendant's position would have or should have known that the charged offense was a reasonably foreseeable consequence of the act aided and abetted.' " (*People v. Medina* (2009) 46 Cal.4th 913, 920, quoting *People v. Nguyen* (1993) 21 Cal.App.4th 518, 535.)

In *Chiu*, the California Supreme Court held that premeditation and deliberation "is uniquely subjective and personal. It requires more than a showing of intent to kill; the killer must act deliberately, carefully weighing the considerations for and against a choice to kill before he or she completes the acts that caused the death." (*Chiu*, *supra*, 59 Cal.4th at p. 166.) In murder cases, "the natural and probable consequences doctrine serves the legitimate public policy concern of deterring aiders and abettors from aiding or encouraging the commission of offenses that would naturally, probably, and foreseeably result in an unlawful killing." (*Id.* at p. 165.) The deterrent effect of the doctrine "is served by holding [aiders and abettors] culpable for the perpetrator's commission of the nontarget offense of second degree murder." (*Ibid.*)

The public policy concern, however, "loses its force in the context of a defendant's liability as an aider and abettor of a first degree premeditated murder." (*Chiu, supra,* 59 Cal.4th at p. 166.) Under the natural and probable consequences theory of liability "the connection between the [aider and abettor's] culpability and the perpetrator's premeditative state is too attenuated to impose aider and abettor liability for first degree murder." (*Ibid.*) As a result, aider and abettor liability for first degree

premeditated murder "must be based on direct aiding and abetting principles" and not pursuant to the natural and probable consequences doctrine. (*Id*. at p. 159.)

Following the close of evidence, the jury was instructed on both theories of aider and abettor liability: direct aiding and abetting and the natural and probable consequences doctrine. (*Chiu*, *supra*, 59 Cal.4th at pp. 160-161.) The Supreme Court reversed the defendant's conviction for first degree murder, finding that the jury might have convicted the defendant on the legally invalid natural and probable consequences theory and the Supreme Court could not "conclude beyond a reasonable doubt that the jury ultimately based its first degree murder verdict on . . . the legally valid theory that defendant directly aided and abetted the murder." (*Id*. at p. 168.)

B. Standard of review

The District Attorney argues that, in a petition for writ of habeas corpus seeking relief under *Chiu*, the burden is on Lee to plead and prove that his conviction was not based on the legally incorrect theory. This is incorrect.

After briefing was completed in this case, the California Supreme Court decided this question in *In re Martinez* (2017) 3 Cal.5th 1216 (*Martinez*), holding that a habeas petitioner alleging *Chiu* error "does not carry the burden of demonstrating that his conviction was based on insufficient evidence." (*Id*. at p. 1224.) Where the record shows "the jury was instructed on correct and incorrect theories of liability, the presumption is that the error affected the judgment." (*Ibid*.) Accordingly, the burden of rebutting that presumption falls on the District Attorney or the Attorney General, who must show " 'beyond a reasonable doubt that the jury based its verdict on the legally valid theory.' " (*Ibid*., quoting *Chiu*, *supra*, 59 Cal.4th at p. 167.)

C. Analysis

We now address whether the District Attorney has shown beyond a reasonable doubt that the jury found Lee guilty of first degree murder as a direct aider and abettor, rather than under the natural and probable consequences doctrine. The facts of *Chiu* are

illustrative, especially as the defendant in that case was, unlike Lee, present when the victim was killed. The defendant in *Chiu* was participating in a fight between two groups of people, and at some point during the melee he urged one of his friends to " '[g]rab the gun.' " (*Chiu, supra,* 59 Cal.4th at p. 160.) His friend got the gun and pointed it at the victim but did not pull the trigger. Seeing his friend's hesitation, the defendant called out, " 'shoot him, shoot him,' " at which point his friend shot and killed the victim. (*Ibid*.) In this case, there was arguably less evidence of direct aiding and abetting on Lee's part than the defendant in *Chiu,* who (1) was at the scene of the altercation and murder; (2) urged the perpetrator during the fight to " '[g]rab the gun' "; and (3) when the perpetrator failed to pull the trigger, called out for him to shoot the victim. (*Chiu, supra,* at p. 160.)

The jury here was presented with multiple messages exchanged between Lee and Khek about Nguyen. In some of those messages, Lee expressed his desire to kill Nguyen and argued to Khek that doing so was appropriate retribution for the shooting at the Magic Sands. If the jury believed that Lee incited Khek to kill Nguyen rather than simply assault him, then Lee could be found guilty of first degree murder as a direct aider and abettor of premeditated murder. The District Attorney highlights these messages, arguing that the "evidence at trial showed *nothing but* premeditation and intent to kill on Lee's part."

This overstates the case, because these were not the only messages introduced at trial. There were also a number of messages in which Khek and Lee discussed their desires and plans to seriously injure Nguyen by breaking his bones, breaking his knee caps or smashing his head on the cement, rendering him a "retard." These messages support the conclusion that Lee and Khek were instead contemplating inflicting great bodily injury on Nguyen, rather than killing him.

The trial court instructed the jury with both theories of aider and abettor liability for first degree murder: the legally valid theory of direct aider and abettor liability and

the (now) legally invalid natural and probable consequences doctrine. In closing argument the prosecution indicated it believed the evidence could show only that Lee was a direct aider and abettor of Nguyen's murder, but allowed for the alternative that, if the jury somehow believed that Lee intended only to seriously injure Nguyen, he could still be guilty of first degree murder under the natural and probable consequences theory. The jury did not specify on the verdict form the basis for finding Lee guilty of first degree murder, i.e., whether as a direct aider and abettor or because Nguyen's death was a natural and probable consequence of Khek's assault.

It is the District Attorney's burden to prove to us "beyond a reasonable doubt that the jury relied on a legally valid theory in convicting [the defendant] of first degree murder." (*Martinez, supra,* 3 Cal.5th at p. 1227.) The District Attorney has not met that burden.

III. DISPOSITION

The order granting the petition for a writ of habeas corpus is affirmed. The matter is remanded to the superior court where the District Attorney may elect to retry defendant on the charge of first degree murder. If the District Attorney elects not to retry defendant, the superior court shall enter judgment reflecting a conviction of second degree murder and resentence defendant accordingly.

Elia, Acting P.J.

WE CONCUR:

Bamattre-Manoukian, J.

Grover, J.

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